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July 19, 2019

District Judge Roslynn R. Mauskopf
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: 2:17-cv-06728-RRM-ARL
Berger v. Michael Foods, Inc.

Dear District Judge Mauskopf:

This office represents the plaintiff in the above action. On July 17, 2019, in accordance with your Honor's Order, defendant filed its letter in opposition to plaintiff's motion to amend the complaint. ECF No. 41-42; ECF Order, July 10, 2019. The Court's Order stated that "Upon receipt of this filing, the Court will further advise the parties as to whether a pre-motion conference is required."

While aware that your Honor's Rules do not specifically provide for a moving party to submit a reply letter in the pre-motion process, plaintiff submits this letter only to clarify one point made by defendant.

Defendant's letter stated, "So far as Michael Foods is aware, its position is understood by Plaintiff, so there is no dispute between the parties as to their agreement that Plaintiff may amend his Complaint, but that Michael Foods will likely move under Rule 12 against at least some of the amendments." ECF No. 42 at 2. To the extent defendant's comment may indicate that plaintiff has consented or agreed to defendant's filing of successive motion to dismiss in return for defendant not opposing plaintiff's proposed amendment, plaintiff has not done so. Fed. R. Civ. P. 12(g)(2) ("[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.").

If plaintiff is granted leave to amend the FAC consistent with the Scheduling Order, defendant retains the right to subsequently move to dismiss based on one of the exceptions to Rule 12(g)(2) or any applicable Rule. Thank you.

Respectfully submitted,

/s/ Spencer Sheehan
Spencer Sheehan

Certificate of Service

I certify that on July 19, 2019, I served the foregoing by the method below to the persons or entities indicated, at their last known address of record (blank where not applicable).

	CM/ECF	First-Class Mail	Email
<u>Defendant’s Counsel</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

/s/ Spencer Sheehan
Spencer Sheehan